

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

**GUIDANCE DOCUMENT**  
**ON THE**  
**IMPLEMENTATION OF THE**  
**IDEA FEDERAL REGULATIONS – PART B, 2006**

*Assistance to States for the Education of Children With Disabilities  
and Preschool Grants for Children with Disabilities: Final Rule  
August 14, 2006*

*Implementation Date: October 13, 2006*

October 2, 2006 (first issue date)  
**December 11, 2006** (reissue date)

## INTRODUCTION

The *Individuals with Disabilities Education Improvement Act*, 2004, P. L. 108-466 (hereinafter IDEA 2004), was signed into law on December 3, 2004 by President George W. Bush. The provisions of the IDEA 2004 became effective on July 1, 2005. On August 14, 2006, the U.S. Secretary of Education issued final regulations governing the *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities*, 34 Code of Federal Regulations, Parts 300 and 301. (hereinafter Federal Regulations). These Federal Regulations have an implementation date of October 13, 2006.

This Guidance Document serves as a summary of the **major** federal provisions that create new requirements and that alter certain Virginia regulations governing special education. In concert with our agency's Guidance Document on the new IDEA requirements, issued in May 2005 (hereinafter Guidance Document 2005), the Virginia Department of Education affirms that the Federal Regulations 2006 supersede current state special education regulations when there is an impact on the State regulation.<sup>1</sup> Any state special education regulation not impacted by the IDEA and the new Federal Regulations remains in effect until newly revised state special education regulations are implemented.

This Guidance Document is available on the web: [www.doe.virginia.gov/VDOE/dueproc](http://www.doe.virginia.gov/VDOE/dueproc). Questions related to this Guidance Document should be directed to:

H. Douglas Cox  
Assistant Superintendent, Special Education and Student Services  
Phone: 804-225-3252  
Email: [doug.cox@doe.virginia.gov](mailto:doug.cox@doe.virginia.gov)

Judith A. Douglas  
Director, Dispute Resolution and Administrative Services  
Phone: 804-225-2771  
Email: [judy.Douglas@doe.virginia.gov](mailto:judy.Douglas@doe.virginia.gov)

Melissa C. P. Smith  
Coordinator, Administrative Services  
Phone: 804-371-0524  
Email: [Melissa.smith@doe.virginia.gov](mailto:Melissa.smith@doe.virginia.gov)

---

<sup>1</sup> This matter was reviewed in consultation with the Office of the Attorney General. See Guidance Document on the Implementation of IDEA 2004, Part B Requirements, May 2005, and Superintendent's Memo, No. 7, Informational, January 14, 2005.

## HOW TO READ THIS DOCUMENT

- ☐ The following sections list the major changes in the new Federal Regulations that impact Virginia's *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*. (hereinafter Virginia Regulations). This Guidance Document does not include a review of the requirements related to:
  - Subpart F: Monitoring, Enforcement, Confidentiality, and Program Information.
  - Subpart G: Authorization, Allotment, Use of Funds, Authorization of Appropriations.
  - Subpart H: Preschool Grants for Children with Disabilities.
  - “Additional Eligibility Requirements” and “Other Provisions Required for State Eligibility”. This includes the provisions related to the National Instructional Materials Access Center (NIMAC) and National Instructional Materials Accessibility Standard (NIMAS).
- ☐ The Guidance Document outlines the new requirements from the federal regulations, which are in addition to the IDEA 2004 provisions outlined in VDOE's Guidance Document 2005. Citations to IDEA 2004 refer to Title 20 of the U.S. Code (20 U.S.C. § 1400 et seq.)
- ☐ Citations for the Virginia Regulations are identified as: 8 VAC, followed by the actual citation.
- ☐ Virginia Regulations not impacted by the new Federal Regulations remain in effect.
- ☐ The Virginia Department of Education is hereinafter referenced as “VDOE”.
- ☐ The United States Department of Education is hereinafter referenced as “USDOE”. The Office of Special Education Programs is hereinafter referenced as “OSEP”. The Code of Federal Regulations is hereinafter referenced as “CFR”. Citations to the new regulations refer to 34 CFR Parts 300 and 301.
- ☐ “Day” means calendar day, unless otherwise specified.
- ☐ The Federal Regulations 1999 contained Appendix A, Question and Answer document on matters related to IEPs. That document is not included in the appendices of the new Federal Regulations. However, its points are subsumed in the “Analysis of Comments and Changes” (hereinafter *Analysis*). Review of the *Analysis* is critical in understanding OSEP's rationale for a particular position and in understanding the intended level of minimal compliance by States and local school

divisions. In some places in the Guidance Document, the *Analysis* is identified along with the Federal Regulations as recommended guidance because of its instructional value. Although the *Analysis* is not regulatory in nature, such guidance is meant to reduce substantially the degree and amount of misapplication or misinterpretation of the application of the IDEA and its implementing regulations.<sup>2</sup> While not legally binding, OSEP's *Analysis* represents the interpretation of the USDOE of the applicable statutory or regulatory requirements in the context of the specific facts presented. Given that the USDOE is the force behind the Federal Regulations governing special education, the interpretations that it gives to their own language must be given deference. Citations to the *Analysis* refer to the Federal Register, at 71 Fed. Reg. 46540 et seq. (August 14, 2006).

- ☐ On August 28-30, 2006, several VDOE staff participated with other SEA administrators in OSEP's Leadership Conference and training on the new Federal Regulations. Throughout the training, OSEP amplified and clarified various aspects of the new requirements and comments as found in their *Analysis*. Several of OSEP's points of clarification are noted in this Guidance Document under "Informational Note". Similar to OSEP's comments in their *Analysis*, OSEP's informal clarification is not regulatory in nature, but is offered to reduce any ambiguity in the implementation of these regulations. OSEP also announced its intention to include in their newly created web site, a Question and Answer section that includes the questions and issues raised during the Conference. <http://idea.doe.gov>
- ☐ Certain new words are used throughout the document:
  - Generally, "student" is now "child".
  - "Shall" and/or "will" is now must.
  - "Test" is now assessment in two sections dealing with evaluations.
  - "Team" is now group, when referring to evaluation/eligibility decisions.
  - "Public agency" is now SEA and/or LEA, although the term "public agency" is used when referring to both agencies.

For our purposes: SEA refers to VDOE, and LEA refers to local school division.

- ☐ The Federal Regulations do not contain the definitions of certain terms if the term is previously defined in another statute. An exception to this rule is with the definition of "Infant or toddler with a disability," at § 300.25, which captures the full definition

---

<sup>2</sup> Congress' Overview Report on the 1997 IDEA Amendments. See OSEP's Handbook pp. 1:5-1:7, 2000 and Revised.

from the IDEA at § 1432 (5). However, the *Analysis* does contain the full definitions.

- “Homeless children,” at § 300.19, states that the term is defined in the McKinney-Vento Homeless Assistance Act. However, the full definition is found in the *Analysis* section, pp. 46562-46563.
- “Limited English proficient” is found in the *Analysis*, p. 46564.
- “Institution of higher education” is found in the *Analysis*, p. 46564.
- “Scientifically based research” is found in the *Analysis*, p. 46576.
- “Universal design” is found in the *Analysis*, p. 46579.
- “Serious bodily injury” is found in the *Analysis*, p. 46723.
- “Highly Qualified” is found in the *Analysis*, p. 46553.
- “Dangerous weapon” is found in the *Analysis*, p. 46723.

□ Several provisions in these regulations require that parent and LEA agree on certain actions; still others require parental consent before the LEA may take action. The *Analysis*, p. 46629, distinguishes these terms:

- The definition of consent in § 300.9 includes the requirement that a parent be fully informed of all information relevant to the activity for which consent is sought in the parent’s native language. The definition also requires that a parent agree in writing to carrying out the activity for which the parent’s consent is sought. Therefore, whenever the term “consent” is used in these regulations, it means that the consent is both “informed” and “written.” Similarly, the terms “consent,” “informed consent,” “parental consent,” and “written informed consent,” as used in these regulations, all are intended to have the same meaning.
- The meaning of the terms “agree” or “agreement” is not the same as “consent.” “Agree” or “agreement” refers to an understanding between the parent and the LEA about a particular question or issue. There is no requirement that an agreement be in writing unless specifically stated in the IDEA and regulations. However, VDOE strongly encourages school divisions and parents to document any agreement which preserves the parties’ understanding of the agreement.

□ We sequenced the major areas to flow with the normal special education progress. For example, we moved the section, State Complaint Procedures, to the sections of Mediation and Due Process. In the Federal Regulations, this section is located between Parentally Placed Students and Early Intervening Services.

## DEFINITIONS

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Developmental Delay</b>
----------------------------

34 CFR § 300.8 (b)
--------------------

8 VAC 20-80-10
----------------

8 VAC 20-80-56 F
------------------

REVISES the definition to clarify that the use of the term “developmental delay” (DD) is subject to the conditions described in § 300.111(b). Basically, § 300.111(b) gives States the option of adopting a definition of DD, but does not require the LEA to adopt and use the term. However, if the LEA chooses to use the term, it must conform to both the State’s definition and age range. LEAs are not permitted to establish the age range independent of the State.

**In Virginia.** The Federal Regulations provide for an age range of 3 through 9, which is consistent with the 1999 federal provisions. However, the new definition adds “or any subset of the age range” including ages 3 through 5. Since the Federal Regulations also provide the State with the discretion of establishing the age range, the Virginia Regulations remain in effect until a change occurs, if any, through the revision of the Virginia Regulations. Virginia’s current age range is found at 8 VAC 20-80-56 F: ages 2 to 5 for preschool children; ages 5 to 8 for school-aged children.

<b>Highly Qualified Special Education Teacher</b>
---

34 CFR § 300.18
-----------------

New
-----

ESTABLISHES that:

- A State may develop a separate HOUSSE<sup>3</sup> for special education teachers but cannot lower the standard for the content knowledge requirements for special education teachers.
- A State may develop a separate HOUSSE for special education teachers that includes single HOUSSE evaluations that cover multiple subjects.

Appendix A in this Guidance Document is a reprint of OSEP’s document on Highly Qualified Teacher issues. OSEP’s document merges the IDEA and federal regulatory requirements.

---

<sup>3</sup> HOUSSE: high objective uniform State standard of evaluation.

### Additional US DOE Guidance on this topic

- The *Analysis*, pp. 46553 – 46562, provides substantive and detailed information on this subject area. It addresses areas such as:
  - ✓ the roles and responsibilities of the special education teacher who does not teach core academic subjects;
  - ✓ requirements not applicable to teachers in private schools;
  - ✓ requirements for someone who is “new to the profession”; etc...
  - ✓ application of “highly qualified” to special populations (i.e., preschool, children of significant cognitive disabilities, students at State schools).
- The *Analysis*, p. 46579, emphasizes that based on the FAPE regulation § 300.101, children with disabilities who are suspended or expelled from their current placement in public schools must continue to be taught by highly qualified teachers.
- Under the Elementary and Secondary Education Act (ESEA - NCLB), each Title 1 school must provide each parent timely notice that the parent’s child has been assigned or has been taught for 4 or more consecutive weeks by a teacher who is not highly qualified. These requirements also apply to special education teachers who teach core academic subjects in Title 1 schools. *Analysis*, p. 46693.

### Informational Note

During its 2006 Leadership Conference, OSEP addressed the question regarding whether veteran regular education teachers being reassigned to special education are considered highly qualified. OSEP responded that the individual is new to special education and therefore, is required to complete the highly qualified requirements for special education. OSEP also addressed the question of whether itinerant special education teachers are subject to highly qualified requirements. OSEP responded in the affirmative.

<b>Other Health Impaired</b>
------------------------------

34 CFR § 300.8 (c)(9)(i)
--------------------------

8 VAC 20-80-10
----------------

REVISES the definition to include Tourette Syndrome as a chronic or acute health issue.

### Additional US DOE Guidance on this topic

The *Analysis*, p. 46550, notes that Tourette Syndrome is commonly misunderstood to be a behavioral or emotional condition, rather than a neurological condition. This syndrome was added to the OHI list to correct the misperception.

**Parent**

34 CFR § 300.30

8 VAC 20-80-10

## § 300.30 (a)

REVISES the definition by substituting “biological” for “natural.” OSEP agreed with the public comments that the word “natural” was offensive (because “natural” presumes then that there are “unnatural” parents).

REVISES the definition to address when a guardian can be considered a parent. Section 300.30 (a)(3) provides that parent means, “A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State)”. As indicated in the *Analysis*, p. 46566, OSEP states that the intent of the change is to address situations where there is a guardian ad litem asserting parent responsibilities under IDEA. OSEP states that such guardians have limited appointments that do not qualify them to act as a parent of the child generally. Therefore, they are not authorized to make educational decisions for the child. The nature of such guardian’s appointment would determine if he or she could be considered parent regarding educational decisions.

Also note that during a due process hearing resolution meeting, the LEA is not permitted to allow a court-appointed advocate to attend a resolution meeting in place of the parent, unless the LEA has appointed that individual as a surrogate parent, or unless the LEA determines that the person is a person acting in the place of the biological or adoptive parent of the child in accordance with the above definition of parent. *Analysis*, p. 46701.

## § 300.30 (b)

ADDS a provision to emphasize that the school division must presume that the biological or adoptive parent is the parent for the purpose of IDEA responsibilities, unless the individual does not have legal authority to make educational decisions for the child. Also, if a judicial decree or order identifies a specific person(s) under § 300.30 (a)(1) through (4) to act as the “parent” of a child or to make educational decisions on behalf of a child, then that individual is the “parent” for IDEA purposes. Section 300.30 (a)(1) through (4) lists such persons as a surrogate parent appointed under the IDEA requirements.

Additional US DOE Guidance on this topic

*Analysis*, pp. 46566 – 46568. This section provides several scenarios of the choices an LEA needs to make when more than one party is qualified to act in the role of parent for IDEA purposes.

**Related Services**

34 CFR § 300.34

8 VAC 20-80-10  
new sub-provisions

## § 300.34 (b)

ESTABLISHES an exception related to children with surgically implanted devices, including cochlear implants:

“Related services do not include a medical device that is surgically implanted, the optimization of that device’s functioning (e.g., mapping), maintenance of that device, or the replacement of that device.”

## § 300.34 (b)(2)

ESTABLISHES the following provisions:

- Such children are still entitled to those related services which the IEP team determines are necessary for FAPE.
- An LEA must still appropriately monitor and maintain medical devices that are needed to maintain the child’s health and safety, including breathing, nutrition, or operation of other bodily functions while the child is transported to and from school or is at school.
- The LEA is not prevented from routine checking of the external component of a surgically-implanted device to make sure it is functioning properly, as required in § 300.113 (b).

Note: Section 300.113 (a) requires the routine checking of hearing aids, and checking of external components of surgically implemented devices.

Additional US DOE Guidance on this topic

OSEP provides detailed clarification of this provision. In its *Analysis*, pp. 46569-46571, and p. 46582, OSEP distinguishes between the exclusion of mapping and what a child may need in the form of related services. OSEP describes the exclusion of mapping to mean: to make the cochlear implant work properly which involves adjusting the electrical stimulation levels provided by the cochlear implant. This exclusion differs from what the child, who has a cochlear implant may need in the form of related services; for example, assistive technology or speech therapy; or, routine checking to determine if the external component of a surgically implanted device is turned on and working, as well as identifying who can do this.

## § 300.34 (c)(4)

ADDS a provision that “interpreting services” includes:

- transcription services, such as communication access real-time translation (CART), C-Print, and Type Well for children who are deaf or hard-of-hearing.
- special interpreting services for children who are deaf-blind.

§ 300.34 (c)(7)

ADDS under the provision of “orientation and mobility” for teaching children who are blind or visually impaired children the use of a service animal to supplement visual travel skills or as a tool for safely negotiating the children’s environment with no travel vision. The use of a long cane remains in this same provision.

§ 300.34 (c)(13)

CREATES a distinction by:

- Revising “school nurse services” to be “school health services and school nurse services.”
- Clarifying that a qualified school nurse provides school nurse services. School health services may be provided by a qualified school nurse or other qualified person.

**Services Plan**

34 CFR § 300.37

NEW

DEFINES this term to mean a written statement that describes the special education and related services that an LEA will provide to parentally-placed private school children with disabilities who have been designated to receive equitable services. It cross-references the specific provisions for these children in §§ 300.132 and 300.137-139, regarding the plans content, development and implementation.

**Supplementary Aids and Services**

34 CFR § 300.42

8 VAC 20-80-10

ADDS to this definition that such supports are also provided in extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with the LRE requirements.

**FREE APPROPRIATE PUBLIC EDUCATION (FAPE)**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

**Children Advancing Grade to Grade**

34 CFR § 300.101

8 VAC 20-80-60 A.1

CLARIFIES with more specific language that FAPE must be available to children with disabilities who need special education and related services even though the child “has not failed or been retained in a course or grade,” and is advancing from grade to grade.

Section 300.111 (c)(1) adds language to the child find requirements regarding children who are suspected of having a disability even though they are advancing from grade to grade.

**Preschoolers – Exception to FAPE**

34 CFR 300.102 (a)(4) NEW

ESTABLISHES a provision that preschool-aged children with disabilities are not eligible for special education and related services under subpart H, if they are receiving early intervention services under Part C. Subpart H is a subpart of Part B and applies to preschool grants for students with disabilities.

**Exception to FAPE**

34 CFR § 300.102 (a)(3)(iv)

8 VAC 20-80-60 A.2.a

New sub-provisions

CLARIFIES that children with disabilities who have graduated from high school with a regular high school diploma are no longer entitled to FAPE. This new provision clarifies that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or GED.

**In Virginia.** “Regular” diploma means “standard” or “advanced studies diploma.” Given the above provision, students with a GED, Modified Standard Diploma, or Special Diploma, who are age-eligible, are still entitled to FAPE.

**Nonacademic Services**

34 CFR § 300.107 (a)

8 VAC 20-80-60 G.1

34 CFR § 300.117

ADDS that each school division must include the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participating in those services and activities.

**Physical Education**

34 CFR § 300.108 (a)

8 VAC 20-80-60 H

ADDS to the provision that FAPE includes PE; however, PE is not part of the FAPE entitlement if the LEA does not provide PE to all children in the same grades. Note, however, that sub-part (b) of this regulation provides that if PE is part of the child's IEP, the LEA has to provide it even though it is not provided to nondisabled children.

<b>Routine Checking of Hearing Aids and External Components of Surgically Implanted Medical Devices</b>
---

34 CFR § 300.113 (a) and (b)
------------------------------

8 VAC 20-80-60 D
------------------

New sub-provisions
--------------------

ADDS that in addition to the LEA's responsibilities for ensuring that hearing aids in school for children with hearing impairments, including deafness, are functioning properly:

- The LEA must ensure that the external components of surgically implanted medical devices are functioning properly.
- For a child using such a device and receiving special education and related services, the LEA "is not responsible for the post-surgical maintenance, programming or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device)."

### **LEAST RESTRICTIVE ENVIRONMENT (LRE)**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>General</b>
----------------

34 CFR § 300.114 (a)
----------------------

8VAC 20-80-64 A.2
-------------------

CLARIFIES the LEA's responsibilities to take steps to provide nonacademic and extracurricular services and activities in a manner necessary to afford children with disabilities an equal opportunity to participate in these services and activities. This provision is not new in Virginia Regulations, but the federal regulation includes a requirement regarding the LEA's additional responsibility to provide supplementary aids and services, determined appropriate and necessary by the IEP team, so that child with a disability has access to those services and activities. This provision is consistent with the language in § 300.107 and § 300.117.

### **Additional US DOE Guidance on this topic**

Regarding LRE matters, OSEP provides several instructional points.

- OSEP distinguishes between "placement" and "location.". *Analysis*, pp. 46588, 46628, and 46687. OSEP reiterates USDOE's longstanding position that the LEA is responsible for the site/specific place/location of the service, such as a specific classroom or specific school. The IEP team is responsible for determining placement as to the provision of special education and related services on the continuum of services; for example, self-contained.

- The LRE requirements apply to all children with disabilities, including preschool children who are entitled to FAPE. *Analysis*, p. 46589.
- OSEP provides direction also regarding the application of LRE to discipline placements. *Analysis*, p. 46586.

### **CHILDREN IN PRIVATE SCHOOLS PARENTALLY-PLACED STUDENTS**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

#### **GENERAL:**

- The Federal Regulations capture the statutory mandates of the IDEA 2004, including the responsibility of the LEA for parentally-placed students with disabilities in private schools located within its jurisdiction.
- Appendix B has been added to the Federal Regulations, “Proportionate Share Calculation” to assist school divisions in calculating the proportionate amount of Part B funds that must be expended on children with disabilities who are parentally-placed. Appendix B is located on p. 46814.

The next two provisions relate to the LEA’s responsibilities for providing this population of children with Child Find activities “similar” to that provided children who are not parentally-placed private school children.

<b>Cost</b>	
-------------	--

34 CFR § 300.131 (d)	8 VAC 20-80-66 D.3
----------------------	--------------------

ADDS that the cost for child find, including individual evaluations, may not be considered in the calculation of the expenditure of the proportionate share of federal funds. This provision is in the Virginia Regulations.

<b>Child Find Timeline</b>	
----------------------------	--

34 CFR § 300.131 (e)	8 VAC 20-80-66 C
----------------------	------------------

ADDS that the child find process must be completed in a time period comparable to that of students attending public schools in the LEA.

**Residency**

34 CFR § 300.131 (f)

NEW

CLARIFIES that the IDEA 2004 does not provide an exception for children with disabilities who reside in one state and attend a private school in another state. The responsible LEA is the one where the private school is located. Also, see *Analysis*, pp. 46590-46591.

**Child Find; Consent**

34 CFR § 300.300 (d)(4)

8 VAC 20-80-66 C

**ADDS**

- Parents who place their children in private schools have the option of not participating in the LEA's child find activities under § 300.131. A discussion of these activities and this requirement is found on p. 46592 of the *Analysis*.
- If the parent of a child who is home schooled or privately placed does not provide consent for an initial evaluation or reevaluation, the LEA may not use due process procedures to effect the consent, and the LEA is not required to consider the child for equitable services.

**Consent – Disclosure of Records**

34 CFR § 300.622 (b)(3)

NEW

ADDS. Parental consent is required for disclosure of records of parentally-placed private school children between LEAs. If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between the LEA where the private school is located and the LEA of residence.

**Development of Services Plan**

34 CFR § 300.132 (b)

8 VAC 20-80-66 D.2

REVISES the heading to clarify that LEAs, not SEAs, are responsible for developing services plans. Note that this was an error in the 1999 federal regulations.

**Application to Preschoolers**

34 CFR § 300.133 (a)(2)(ii)

NEW

CLARIFIES that the provisions for parentally-placed children apply to preschoolers with disabilities, if they are enrolled in a private school that meets the definition of elementary school in § 300.13. Section 300.13 defines “elementary school” as “...a nonprofit institutional day or residential school, including a public elementary charter school, that

provides elementary education, as determined under State law. This provision is also consistent with OSEP the technical assistance document, “Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools,” March 2006. (Question D-1).

**In Virginia.** As VDOE has advised school divisions on this issue, VDOE distinguishes between preschool and day care centers in that the preschool must provide educational instruction. Preschool is counted as an instructional setting under the 619 provisions of the Annual Plan. Part B monies include preschool age children for the set aside monies. This means in Virginia that preschools are included in the provisions for parentally-placed private children with disabilities, including serving nonresident parentally-placed students in private preschools in which the private school is located.

<b>Carry-over Funding</b>
---------------------------

34 CFR § 300.133 (a)(3)
-------------------------

NEW
-----

ESTABLISHES a provision that if an LEA has not expended for equitable services all of the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for services to these children during a carry-over period of one additional year.

<b>Complaints</b>
-------------------

34 CFR § 300.136 (b)
----------------------

8 VAC 20-80-66 D.8.c
----------------------

34 CFR § 300.136 (c)
----------------------

8 VAC 20-80-66 D.8.a
----------------------

34 CFR § 300.140 (b)(2)
-------------------------

8 VAC 20-80-66 D.8.b
----------------------

ADDS

§ 300.136 (b)

This provision applies to a complaint filed with the SEA by a private school official alleging either that the LEA did not:

- engage in consultation that was meaningful and timely, or,
- give due consideration to the views of the private school official.

In these cases, the complaint may be filed with the SEA but not necessarily under the SEA’s Complaint Resolution Procedures. The SEA may choose to use this system for private school complaints, or establish a different mechanism.

**In Virginia.** According to the current Virginia Regulations, such complaints come under VDOE’s complaints system to resolve. This provision will remain in effect until a change occurs, if any, through the revision of the Virginia Regulations.

§ 300.140 (b)(2).

A request for a due process hearing regarding the evaluation requirements in § 300.131 must be filed **with the LEA where the private school is located**. Under § 300.136 (c), a parent may file a complaint under the SEA's Complaint Resolution Procedures that the SEA or LEA failed to meet the requirements in §§ 300.132-300.135 [basic requirements, expenditures and consultation] and §§ 300.137 – 300.144 [equitable services, location of services and transportation, complaints, funding, personnel, property, equipment and supplies]. Reminder: Parent may also file for a due process hearing for evaluation and consent requirement issues. (§ 300.311).

<b>Highly Qualified Special Education Teacher</b>
---

34 CFR § 300.138 (a)(1)
-------------------------

NEW
-----

CLARIFIES a specific IDEA provision, consistent with the NCLB requirements, that private school teachers are not required to meet the highly qualified special education teacher requirements. This also applies to those teachers providing equitable services to parentally-placed private school children and those serving publicly-placed children. (§ 300.146)

Additional US DOE Guidance on this topic

Regarding this topic, OSEP provides several instructional points:

- The LEA where the private school is located may not seek reimbursement from the LEA of residence for the cost of the evaluation or for the LEA of residence to conduct the evaluation. *Analysis*, p. 46592 for alternative options.
- Reevaluation is part of the LEA's child find responsibilities. *Analysis*, p. 46593.
- If the LEA where the private school is located determines a child eligible for special education and related services, the LEA of residence is responsible for making FAPE available to the child. If the parent makes clear his/her intention to keep the child in the private school in another LEA, the LEA of residence need not make the FAPE available to the child. *Analysis*, p. 46593.

The same applies in the case where the private school is located in the LEA of residence.

- If the private school straddles two LEAs, the SEA determines which LEA is responsible for these requirements. *Analysis*, p. 46594.
- If the student resides in a different country but attends the private school in the United States, the obligations for parentally-placed students apply to these children as well. *Analysis*, p. 46591.

- Whether home-school children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Such children may be considered parentally-placed private school children only if the State recognizes home-schools as private schools. *Analysis*, p. 46594.

**In Virginia.** The Virginia Regulations currently include these children. See 8 VAC 20-80-66 C and D.

- If a parent of a parentally-placed child disagrees with an evaluation obtained by the LEA where the private school is located, the parent may request an IEE at public expense with that LEA. *Analysis*, p. 46597.

#### Informational Note

During its 2006 Leadership Conference, OSEP addressed numerous questions and concerns regarding LEAs bearing the responsibility for nonresident students. OSEP emphasized that the USDOE could not restrict the IDEA statute in this regard. The statute directs the regulations and therefore, the regulations cannot override the federal law in this regard.

### **METHODS OF ENSURING SERVICES**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Obligations Related to Public Benefits or Insurance</b>
--

34 CFR § 300.154 (d)
----------------------

8 VAC 20-80- 70 E.1.e and f
-----------------------------

REVISES the requirements regarding children with disabilities who are covered by public benefits or insurance to say that the LEA must:

- obtain parental consent each time that the LEA is accessing the parent's public benefits or insurance; and
- notify the parents that their refusal to allow access to their public benefits or insurances does not relieve the LEA of its responsibility to ensure that all required services are provided at no cost to the parents.

**In Virginia.** Under Virginia's Regulations, the parental consent and notification requirements apply when the LEA is accessing the parent's insurance. However, the new requirements apply to both public benefits and insurance. VDOE will issue technical assistance on this item as it applies especially to Medicaid.

## EARLY INTERVENING SERVICES

The new Federal Regulations mirror the IDEA 2004 statutory changes. The following clarifications are beneficial in providing guidance on these changes.

### Additional US DOE Guidance on this topic

- The *Analysis*, p. 46626, clarifies that under 34 CFR § 300.226 (a) for accessing early intervening services, a child previously identified as being a child with a disability, but who currently does not need special education and related services, is not prevented from receiving early intervening services.
- Early intervening services may not be used for preschool children. The IDEA 2004, at § 1413 (f)(1), states that early intervening services are for children in K through 12, with particular emphasis on children in kindergarten through grade 3. *Analysis*, p. 46627.
- The *Analysis*, p. 46627, provides a clear distinction between early **intervening** services and early **intervention** services.
- The procedural safeguards regarding for example, notice and consent, do not apply to children receiving or being considered for early intervening services since they are not entitled to FAPE at that point. *Analysis*, p. 46626.
- For additional guidance regarding the use of Part B funds for early intervening services, see *Analysis*, pp. 46626-46627.
- For additional guidance regarding reporting requirements to the State, see *Analysis*, p. 46628.

## PARENTAL CONSENT Initial Evaluations/Services

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

**Consent – Initial Evaluation – Child Who is a Ward of the State**  
 34 CFR § 300.300 (a)(2)                      NEW

ESTABLISHES an application only to children who are wards of the State not living with a parent and limited only to the situation of seeking consent for an initial evaluation. The LEA is not required to postpone the evaluation for such a child and await the appointment of a surrogate when any of the following occurs:

- if the LEA has made reasonable effort to obtain the parent's consent, but the parent's whereabouts are unknown,

- the rights of the parent have been terminated under State law,
- or the parent's rights to make education decisions have been subrogated by a judge under State law and consent for the initial evaluation has been given by an individual appointment by the judge to represent the child.

In either instance, the LEA does not have to wait to appoint a surrogate in order to do the evaluation.

#### Additional US DOE Guidance on this topic

*Analysis*, pp. 46630-46631

- The above requirement would not apply to reevaluations because a surrogate should already have been appointed if no parent can be identified, the whereabouts of the parent are unknown, the child is a ward of the State, or the child is an unaccompanied homeless youth.
- The appointment of a surrogate needs to move forward in accordance with the procedures for surrogate parents, at § 300.519 (b) through (h).

#### **Parental Refusal to Consent**

34 CFR § 300.300 (a)(3) & (c)(1)

8 VAC 20-80-70 E.5

34 CFR § 300.534 (c)(1)

New sub-provisions

§ 300.300 (a)(3) & (c)(1)

CLARIFIES that the State or LEA does not violate the requirements of § 300.111 (eligibility determination) and §§ 300.301 through 300.311 (evaluations, reevaluations); that is, their obligation to locate, identify, and evaluate children of being children with disabilities if the SEA or LEA declined to pursue an evaluation or reevaluation (i.e. pursue due process) to which the parent has refused or failed to consent.

REALTES TO § 300.534 (c)(1)

An LEA would not be deemed to have knowledge that a child is a child with a disability for disciplinary purposes, if a parent has not allowed the child to be evaluated or refuses services under the IDEA 2004. Therefore, a parent would not be able to assert any of the protections provided to children with disabilities under IDEA 2004, and the child would be subject to the same disciplinary procedures as any other child.

#### **Documenting Parental Consent**

34 CFR § 300.300 (d)(5)

8 VAC 20-80-62 D.4 (IEP)

34 CFR § 300.322 (d)(1) through (3)

8 VAC 20-80-70 E.6.b (reevaluation)

CLARIFIES that an LEA must document its attempts to obtain parental consent by using the procedures in § 300.322 (d):

- detailed records of telephone calls made or attempted and the results of those calls;
- copies of correspondence sent to the parents and any response received; and,
- detailed records of visits made to the parent’s home or place of employment and the results of those visits.

**Additional US DOE Guidance on this topic**

The *Analysis*, p. 46629, speaks to the State’s option to permit electronic or digital signatures for parental consent. However, the State “...would need to take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process.”

**In Virginia.** This item will be reviewed during the revision of the Virginia Regulations.

“Fails to respond” is defined to generally mean that, in spite of the LEA’s efforts to obtain consent for initial evaluation, the parent has not indicated whether he or she consents or refuses consent to the evaluation. *Analysis*, p. 46632.

<p><b>Consent for Services</b></p>
------------------------------------

<p>34 CFR § 300.300 (b)(4)(ii)</p>
------------------------------------

<p>8 VAC 20-80-70 E</p>
-------------------------

ADDS language that strengthens the IDEA statutory requirement relieving LEAs of any potential liability for failure to convene an IEP team or develop an IEP for a child whose parents refuse consent or fail to respond to a request for consent to the initial provision of special education and related services.

**Additional US DOE Guidance on this topic**

The *Analysis*, p. 46634, notes that the LEA is not prohibited from convening an IEP team and developing an IEP for the child as a means of informing the parent about prospective services if the parent was to consent.

On p. 46633, OSEP states that they are considering the question of whether parents who previously consented to the initiation of special education services should have the right to subsequently remove their child from special education services. OSEP states that, “We anticipate publishing a notice of proposed rulemaking in the near future seeking public comment on this issue.”

**In Virginia.** 8 VAC 20-80-70 E remains current regarding if a parent revokes consent, the revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

## PARENTAL CONSENT Reevaluations

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Consent Override</b>	
34 CFR § 300.300 (c)	8 VAC 20-80-54 G.2.b
	8 VAC 20-80-70 E.5
34 CFR § 300.300 (d)(4)	New sub-provisions

### § 300.300 (c)

ADDS language to clarify that an LEA may, but is not required to, pursue a reevaluation using dispute resolution options of due process or mediation when the parent does not provide consent.

**In Virginia.** Virginia Regulations, 8 VAC 20-80-54 G.2.a and b, distinguish when a parent has failed to respond with consent, and when a parent refuses consent. In the first instance, the LEA must proceed to reevaluate, as if parental consent has been given. The second instance is consistent with the provision in the Federal Regulations for when the parent refuses consent.

### § 300.300 (d)(4)

ESTABLISHES a provision wherein the consent override option is not permitted for children who are home-schooled or parentally-placed in private schools. Additionally, the LEA is not required to consider the child eligible for services under requirements related to parentally-placed private school children with disabilities.

### Additional US DOE Guidance on this topic

The *Analysis*, p. 46635, provides a detailed explanation for why it would be overly intrusive to expect an LEA to insist on an evaluation for a child who is home-schooled or parentally-placed, since the IDEA does not require LEAs to provide FAPE to these children.

### **Review of Existing Data**

34 CFR § 300.300 (d)(1)(i)

8 VAC 20-80-70 E.4.a

Parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation, or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children. This requirement is in the current Virginia Regulations.

## **EVALUATIONS AND REEVALUATIONS**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements:

### **Timelines**

The IDEA established a 60 calendar-day default timeline for initial evaluation unless the State had an established timeline. The Federal Regulations recite this provision at 34 CFR § 300.301 (c)(1)(i) and (ii). The Virginia Regulations have a longstanding established timeline of 65 business days for completion of an evaluation and eligibility determination. In its *Analysis*, p. 46637, OSEP states that the USDOE will not require that a State-established timeframe be less than 60 days or place additional requirements on States with timeframes greater than 60 days because the IDEA “...gives States the authority to establish different timeframes, and imposes no restrictions on State exercise of that authority.” Note that the federal 60 day timeline applies to completion of an evaluation, whereas Virginia’s 65 day timeline applies to the completion of evaluation and an eligibility determination. If in the revision of its regulations, Virginia elects to use the 60 day or alternative timeline for completion of evaluations, an additional timeline would have to be developed for eligibility determinations, unless the revised Virginia regulation requires the completion of an evaluation and an eligibility determination within the newly established timeline.

The federal 60 calendar day timeline is triggered upon parental consent. Virginia’s timeline is triggered upon the special education administrator/designee’s receipt of the referral for evaluation. Because the Federal Regulations place no restrictions on a State-established timeline and the trigger point is part of the timeline and not an independent element, VDOE will maintain the same trigger-date of when the special education administrator/designee receives the referral for evaluation to begin the 65 day timeline.

<b>Transfer Children</b>
--------------------------

34 CFR § 300.304 (c)(5)
-------------------------

8 VAC 20-80-56 K.2
--------------------

This regulation mirrors the IDEA 2004 requirement that assessments of children with disabilities who transfer from one LEA to another are coordinated with those children’s prior and new schools, as necessary and as expeditiously as possible. ADDS and CLARIFIES that this applies to transfers “in the same school year.”

<b>Reviewing Existing Evaluation Data</b>
---

34 CFR § 300.305 (a)(1)(ii)
-----------------------------

8 VAC 20-80-54 D.1.a
----------------------

This provision mirrors the IDEA 2004 requirement regarding that a review of existing evaluation data on a child must include, as appropriate, current classroom-based, local, or State assessment data. A comma was added between “classroom-based” and “local” to

distinguish that there are three types of assessments: current classroom-based, local, or State assessment.

**Evaluating Graduates**

34 CFR § 300.305 (e)(2)

8 VAC 20-80-58 A

ESTABLISHES a provision that an LEA is not required to evaluate a child with a disability who graduates with a regular diploma.

**Copy of the Evaluation Report to the Parent**

34 CFR § 300.306 (a)(2)

8 VAC 20-80-54 E. 16

New sub-provision

ADDS that a copy of the evaluation report and documentation of the determination of eligibility, which the LEA is required to give the parent, must be provided at no cost to the parent.

**Evaluation Language**

34 CFR § 300.306 (b)(1)(ii)

NEW

ADDS the word “appropriate” to refer to a “lack of appropriate instruction in math” to be consistent with a “lack of appropriate instruction in reading”.

**Alternative, Research-based Procedures**

34 CFR § 300.307 (a)(3)

8 VAC 20-8-56 G

New sub-provision

ESTABLISHES the provision that allows States to use alternative, research-based procedures for identifying children with SLD.

**Additional USDOE Guidance on this topic**

See *Analysis*, p. 46652, for extensive discussion on RTI and this point on pp. 46646-46649.

**Terminology Change**

34 CFR § 300.309 (a)(2)(ii)

8 VAC 20-80-54 D.1

34 CFR § 300.306 (a)(1)

8 VAC 20-80-56 B.1-3

REVISES “team members” to be “group members” to distinguish this group from the IEP team. The team of qualified professionals and parent that makes the eligibility determination does not necessarily have to be the same team members as an IEP team. The State may have the same individuals as the IEP team.

**In Virginia.** Virginia Regulations currently use the term “group” and provides that the group may be an IEP team.

## DETERMINING A CHILD WITH SPECIFIC LEARNING DISABILITIES

34 CFR § 300.309 (a)(1)	8 VAC 20-80-56 G
34 CFR § 300.311 (a) (1) through (7)	
34 CFR § 300.307 (a) and (b)	

### § 300.309 (a)(1)

CLARIFIES that as a first element in determining whether a child has an SLD, the group must determine that the child does not demonstrate achievement that is adequate for the child's age or the attainment of State-approved grade-level standards when provided with learning experiences and instruction appropriate for the child's age or State approved grade-level standards in one or more of the areas listed in this provision.

ADDS reading fluency to the list of standards to be considered.

This provision joins the other two provisions in IDEA 2004 in support of the State's adopted criteria for determining whether a child has a specific learning disability.

### § 300.307 (a) and (b). The criteria requires that the SEA:

- must not require the use of a severe discrepancy model;
- must permit the use of a process based on the child's response to scientific, research-based intervention; and,
- may permit the use of other alternative research-based procedures.

The LEA must use the State criteria in determining whether a child has an SLD.

### §300.311 (a)(1) through (7)

DETAILS the specific documentation required for the eligibility determination for a child suspected of having an SLD. This item is discussed further below.

34 CFR § 300.309 (a)(2)(ii)	8 VAC 20-80-56 G
-----------------------------	------------------

CLARIFIES that the eligibility group can determine that a child has an SLD if the child meets the criteria in § 300.309 (a)(i) above, and exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age and State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD.

“State-approved results” is changed to “State-approved grade-level standards”.

34 CFR § 300.309 (a)(3)(vi)	8 VAC 20-80-56 G.3 New sub-provision
-----------------------------	---

ADDS “limited English proficiency” in the list of factors that must be ruled out as a primary factor affecting a child’s performance before determining that a child is eligible for special education under the category of SLD.

34 CFR § 300.309 (b)	NEW
----------------------	-----

REVISES and CLARIFIES that the eligibility group consider evidence whether the child was provided appropriate instruction in reading or math and whether this evidence means that the lack of appropriate instruction was the source of underachievement.

<b>Eligibility Timeline - SLD</b>	
34 CFR § 300.309 (c)	8 VAC 20-80-54 H New sub-provision

ESTABLISHES a provision wherein the parent and eligibility group may agree in writing to extend the mandated timeline to obtain additional data that cannot be obtained within the timeframe.

<b>Parental Consent</b>	
34 CFR § 300.309 (c)	8 VAC 20-80-54 G New sub-provision

ESTABLISHES a provision wherein the LEA must obtain parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided appropriate instruction, and whenever a child is referred for an evaluation.

<b>Observation</b>	
34 CFR § 300.310 (a) through (c)	8 VAC 20-80-54 E. 14 8 VAC 20-80-56 C.7.c New sub-provision

ADDS and CLARIFIES that the LEA must ensure that the child is observed in the child’s learning environment. The LEA must ensure appropriate observation and documentation of the child’s academic performance and behavior in the areas of difficulty to determine whether a child has an SLD. The eligibility group is required to use the information obtained from the routine classroom observation or conduct a new observation. Parent consent is required for observations conducted after a child is suspected of having a disability and is referred for an evaluation.

**Eligibility Report**

34 CFR § 300.311 (a)(5), (6), (7)

8 VAC 20-80-56 G.3

8 VAC 20-80-56 G

New sub-provision

ADDS that the eligibility report include:

## § 300.111 (a)(5)

- whether the child does not achieve adequately to meet State-approved standards and does not make sufficient progress to meet the standards.

## 300.311 (a)(6)

- documentation that evidences the effects of visual, hearing, or motor disability; mental retardation; emotional disturbance, cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level. [underscored is the new language]

## § 300.311 (a)(7)

- evidence that when the child has participated in an RTI process, the instructional strategies used and the student-centered data collected, the parents were informed of State policies regarding child performance data that would be collected and the general education services that would be provided; strategies to support the child's rate of learning; and a parent's right to request an evaluation at any time.

Additional US DOE Guidance on this topic

- The *Analysis*, p. 46637, speaks to the unique challenges of evaluating homeless children and youth with disabilities. Their high mobility rate and potential range of evaluation needs may require the State to consider establishing policies to address their needs including adopting a timeframe for initial evaluations that is less than the State-established timeframe or federal 60 day timeline.
- The *Analysis*, p. 46637, notes that a State could adopt exceptions to the timeframe for evaluations, other than those listed in § 300.301 (d).
- A reevaluation cannot be conditioned on the parent's providing reasons for requesting a reevaluation. *Analysis*, p. 46640.
- If a parent agrees to waive a 3-year reevaluation and later decides to request an evaluation, they can do so. *Analysis*, p. 46641.
- OSEP addresses the issue of LEAs conducting evaluations for children to meet the entrance or eligibility requirements of a vocational rehabilitation program, or college or other postsecondary setting. IDEA does not require LEAs to conduct evaluations for this purpose, because of the significant cost on LEAs. *Analysis*, p. 46644-46645.

- The *Analysis* addresses a number of issues relative to research-based interventions, including multiple reference cites, *Analysis* pp. 46647-46653; SLD criteria, p. 46649. Note especially the additional issues related to RTI models, pp. 46651; 46653-46654.
- USDOE is directing technical assistance funds under IDEA Part D to implement RTI models. OSEP plans to develop and disseminate an RTI resource kit and devote additional resources to technical assistance providers to assist States in implementing RTI models. OSEP is also to identify and develop RTI implementation sites and evaluate SLD identification models in math and reading. The Comprehensive Center on Instruction, jointly founded by OSEP and the Office of Elementary and Secondary Education, will provide technical assistance to States on RTI implementation. *Analysis*, p. 46654.
- How long should an intervention continue before determining a child has not made adequate progress and referring the child for an evaluation and eligibility for special education? See *Analysis*, pp. 46657- 46658, details a response to this question.
- The eligibility group is in the best position to determine the appropriate environment in which to conduct the observation of a child who is less than school age or out of school. *Analysis*, p. 46660.

### INDIVIDUALIZED EDUCATION PROGRAMS (IEP)

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements:

#### Parental Consent - Transition Participants

34 CFR § 300.321 (b)(3)

8 VAC 20-80-62 C.2

New sub-provision

ADDS a provision that requires that the LEA must now have parental consent to invite representatives of participating agency for transition services. The reason is related to the confidential information from the child's record being shared at the meeting. See *Analysis*, p. 46670 for additional guidance on this matter.

#### Excusals

34 CFR § 300.321 (e)(1)

8 VAC 20-80-62 C

New sub-provision

CLARIFIES the IEP team members for whom the requirements regarding excusals apply. Excusals apply to the required members: the regular education teacher of the child (if the child is, or may be participating in the regular education environment); not less than one special education teacher of the child (or where appropriate, not less than one special

education provider of the child); the LEA representative or designee; and an individual who can interpret the instructional implications of the evaluation results.

For other individuals who are invited at the discretion of the LEA or parent, consent or written agreement for excusal is not necessary because they are not required IEP team members. *Analysis*, p. 46675.

#### REMINDER

- Parental written informed consent is required for excusal of an IEP team member whose area is being modified or discussed (§ 300.321 (e)(2)). Consent means that the parent has been fully informed in his or her native language, or other mode of communication, and understands that the granting of consent is voluntary and may be revoked at any time. Therefore, the school division must provide the parent with appropriate and sufficient information to ensure that the parent fully understands that the parent is consenting to excuse an IEP team member from attending an IEP team meeting in which the member's area of the curriculum or related services is being changed or discussed, and that if the parent does not consent, the IEP meeting must be held with that IEP team member in attendance.
- When an IEP team member's area is not being modified or discussed, § 300.321 (e)(1) provides for the parent and LEA to agree in writing that the member's attendance is not necessary. The content of this agreement is up to the LEA and parent. *Analysis*, p. 46674
- The regulation maintains the IDEA requirement that for children transitioning from Part C to Part B, of inviting the Part C coordinator or other representatives of the Part C system at the initial IEP team meeting . § 300.322 (b)(1)

#### **Deleted**

34 CFR § 300.342 (b)(1)(i)

8 VAC 20-80-62 B.2.a

DELETES the requirement that LEAs ensure that an IEP is in effect before special education services are provided to an eligible child. This provision is implicit in the new regulations, § 300.323 (a), which requires the LEA to have an IEP in effect for each child with a disability in the LEA's jurisdiction at the beginning of each school year.

#### **Informing IEP Members of IEP Changes**

34 CFR § 300.324 (a)(4)

8 VAC 20-80-62 B.3.b

8 VAC 20-80-62 B.3.a

New sub-provision

ADDS a provision that the LEA ensures that the child's IEP team is informed of changes made to a child's IEP when IEP changes are made without an IEP team meeting.

### Additional US DOE Guidance on this topic

- IEP teams need to include in their review each student's "functional" performance. "Functional" generally refers to skills or activities that are not considered academic or related to a child's academic achievement; it is often used in the context of routine activities of every day living. *Analysis*, p. 46661.
- "Academic achievement" generally refers to a child's performance in academic areas, for example, reading or language arts, math, science, and history. *Analysis*, p. 46662.
- "Peer reviewed research." There is no single definition because the review process varies depending on the type of information to be reviewed. Generally, it refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of information meets the standards of the field before the research is published. *Analysis*, p. 46664.
- IDEA does not require an IEP to include specific instructional methodologies. If an IEP team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP. *Analysis*, p. 46665.
- Parents may consent to the attendance of an observer, who is not an IEP team member and who is asked to be at the meeting, because the parent can consent to sharing of confidential information about the child. *Analysis*, p. 46670.
- The LEA is required to invite a child with a disability to attend the child's IEP team meeting if the meeting's purpose will be to consider secondary transition issues. However, until the child reaches the age of majority, unless the parent's rights to act for the child are terminated or otherwise limited, only the parent has the authority to make educational decisions for the child, including whether the child should attend an IEP team meeting. *Analysis*, p. 46671.
- The LEA determines the personnel to fill the roles of the LEA's required IEP team participation. A parent does not have a legal right to require other members to attend an IEP team meeting. Therefore, if a parent invites other LEA personnel who are not designated by the LEA to be on the IEP team, those LEA staff are not required to attend. *Analysis*, pp. 46674-46675.
- Cautionary note: "An LEA that routinely excuses IEP team members from attending IEP team meetings would not be in compliance with the requirements of the Act [IDEA 2004], and, therefore, would be subject to the State's monitoring and enforcement provisions." *Analysis*, p. 46674.

- What regular education teacher should attend the IEP team meeting? See *Analysis*, p. 46675 for guidance.
- It is up to the LEA to determine the individual with the authority to make the agreement with the parents to excuse an IEP team member from attending the IEP meeting. The designated individual must have the authority to bind the LEA to the agreement with the parent or provide consent on behalf of the LEA. *Analysis*, pp. 46675-46766.
- The IDEA 2004 and regulations do not specify how far in advance of an IEP meeting the LEA should notify the parent of the LEA's request to excuse a member from attending the IEP meeting. Ideally, it should be within a reasonable time. However, unavoidable conflicts or emergency situations will occur. If the parent disagrees with the excusal of an IEP team member, the parent can agree to continue with the meeting, require an additional meeting if more information is needed, or require that the meeting be rescheduled. *Analysis*, p. 46676.

#### Informational Note

During its 2006 Leadership Conference, OSEP addressed the question of whether the LEA representative could be excused from an IEP meeting. OSEP responded that the exception provision in § 300.321 applies to the curriculum component reviewed by the IEP team and the required IEP team member responsible for that curriculum component. Even though the regulation designates the LEA representative/designee as a required IEP team member, the regulation does not contemplate a situation wherein the LEA representative would be excused from the IEP meeting, since the LEA has to ensure that the representative's responsibilities are still preserved.

- Regarding a child with an IEP transfer from one state to another state, if the new LEA evaluates the child, the evaluation is not considered a reevaluation, but is an initial evaluation. *Analysis*, pp. 46681-46682.
- If the LEA uses an alternative means of meeting participation that results in additional costs, the LEA is responsible for these costs. *Analysis*, p. 46687.

### **PROCEDURAL SAFEGUARDS**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Parental Participation in Meetings</b>
---

34 CFR § 300.501 (c)(2)
-------------------------

8 VAC 20-80-62 D.5
--------------------

CROSS-REFERENCES to the new requirement in § 300.322 (a) – (b)(1) which requires the LEA to take whatever action is necessary to ensure that the parent understands the

proceedings at an IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. This provision is currently in the Virginia Regulations.

<b>Independent Educational Evaluation (IEE)</b>	
---	--

34 CFR § 300.502 (b)(5)	8 VAC 20-80-70 B
-------------------------	------------------

34 CFR § 300.502 (c)	New sub-provision
----------------------	-------------------

§ 300.502 (b)(5)

CLARIFIES that a parent is entitled to only one IEE at public expense each time the LEA conducts an evaluation with which the parent disagrees.

§ 300.502 (c)

ADDS the right of either parent or LEA to present the results of a publicly-funded IEE in a due process hearing. Additionally, if the parent shares a privately-funded IEE with the school division, the privately-funded IEE may be used as evidence in a due process hearing. Both the publicly-funded IEE and the privately-funded IEE are to be considered by the IEP team and both of these types of IEEs may be submitted as evidence in a due process hearing.

<b>Prior Notice</b>	
---------------------	--

34 CFR § 300.503	8 VAC 20-80-70 C.2
------------------	--------------------

DELETES the former § 300.503 (a)(2) which provides that if the prior written notice relates to an action that also requires parental consent, the LEA may give notice at the same time it requires parental consent.

The rationale for this deletion is that the requirement is not necessary because parental consent cannot be obtained without the requisite prior written notice. Also, the LEA still has the option of providing the parent the prior written notice at the same time that parental consent is sought. *Analysis*, p. 46691.

<b>Procedural Safeguards</b>	
------------------------------	--

34 CFR § 300.504 (a)	8 VAC 20-80-70 D.1
----------------------	--------------------

34 CFR § 300.504 (c)(5)	
-------------------------	--

§ 300.504 (a)

CLARIFIES when the procedural safeguards notice must be provided to the parent as once a year, except upon:

- initial referral
- parental request for evaluation
- receipt of the first complaint under the State's complaint process in that school year
- receipt of the first request for a due process hearing in that school year
- request by the parent
- the use of discipline procedures related to long-term removals (cross-referenced to § 300.503(h))

### § 300.504 (c)(5)

REVISES the requirement that parents are to be informed of the opportunity to present and resolve complaints through the due process system and the State complaint system. The word “and” replaces “or” which clarifies that parents may dually file their dispute in both systems. Section 300.152 (c)(1) serves as a reminder that if this occurs, any part of the State complaint that is being addressed in a due process hearing must be set aside (held in abeyance) until the completion of the due process hearing. This provision is in the current Virginia Regulations, 8 VAC 20-80-78 C.3.c.

### Additional USDOE Guidance on this topic

- If a parent disagrees with the LEA’s evaluation that includes a review of the results of a child’s response to intervention processes, the parent has a right to an IEE at public expense in accordance with the IEE requirements. However, the parent does not have the right to an IEE at public expense simply because the parent disagrees with the LEA’s decision to use data from a child’s response to intervention as part of its evaluation to determine if the child is a child with a disability and the educational needs of the child. *Analysis*, p. 46689.
- Except for the criteria contained in the regulations, the LEA may not impose conditions or timelines related to obtaining an IEE at public expense. *Analysis*, p. 46689.
- For appropriate factors in LEAs’ establishing reasonable cost containment criteria, see *Analysis*, pp. 46689-46690.
- For information regarding the LEA’s criteria for IEEs, see *Analysis*, p. 46690.
- If a hearing officer orders an IEE, parental consent is required for an LEA to release educational records to the independent evaluator, because in these situations, the independent evaluator is not an official of a participating agency. If the parent refuses consent, a hearing officer could decide to dismiss the complaint. *Analysis*, p. 46690.
- An LEA may use the IEP as part of the prior written notice so long as the document includes the requirements of § 300.503 (content of notice). *Analysis*, p. 46691.
- The LEA does not meet its obligation to provide parents with a copy of the procedural safeguards notice by directing the parent to the LEA’s web site. The LEA must still offer the parent a printed copy of the document. If the parent declines the printed copy and prefers the LEA’s web site, the LEA should document the offer and the parent’s preference. *Analysis*, p. 46693.

### Informational Note

During its 2006 Leadership Conference, OSEP addressed the question of whether the parent is entitled to one IEE for each evaluation period or one for each evaluation component conducted by the LEA. OSEP stated that the definition of “evaluation”

generally refers to the procedures used to determine, in part, whether a child has a disability. (§ 300.15). However, OSEP further emphasized that in this context the plain meaning of § 300.502, as well as its comments in its *Analysis*, refers to the parent's entitlement to an IEE each time an evaluation component is completed. They clarified that a parent could take issue with multiple evaluation components during a single evaluation period which impact the child's eligibility determination and/or decisions related to the educational needs of the child. Recall that the LEA may initiate due process to show that its evaluation is appropriate.

### STATE COMPLAINT PROCEDURES

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

#### Resolution Option

34 CFR § 300.152 (a)(3)(i) and (ii)

8 VAC 20-80-78 C  
new sub-provision

ADDS a requirement that the complaint resolution procedures must provide the LEA with an opportunity:

- to propose, at the LEA's discretion, a resolution of the complaint; and,
- to respond to the complaint, including, at minimum, an opportunity for the parent and school division to voluntarily engage in mediation.

**In Virginia.** VDOE historically has included in its complaint resolution procedures and Notice of Complaint the provision for early resolution, including the use of mediation, to resolve the complaint issue(s).

#### Timeline

34 CFR § 300.152 (b)(1)(ii)

8 VAC 20-80-78 C.4.b(2)  
new sub-provision

REVISES the mandated timeline requirements. The 60 day timeline for the SEA to issue findings in a complaint may be extended if the complainant and the LEA **agree** to mediate or use other alternative means of dispute resolution, if available in the State.

#### Additional US DOE Guidance on this topic

The *Analysis*, p. 46604, underscores that parental **consent** is not required; it is sufficient to require **agreement** of the parties. See earlier section of this Guidance Document ("How to Read This Document") that distinguishes between consent and agreement. Additionally, the extension ends at any time either party withdraws from mediation or

other alternative means of dispute resolution, or withdraws the agreement to the extension of the time limit. p. 46604.

<b>Complaint Issues Also in Due Process</b>
---

34 CFR § 300.152 (c)
----------------------

8 VAC 20-80-78 C.3.c
----------------------

The following provisions incorporated now in the Federal Regulations are already requirements in the Virginia Regulations.

- If a complaint is also the subject of a due process hearing, or contains multiple issues of which one or more is a part of a due process hearing, the State must set aside (hold in abeyance) any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing.
- Any issue in the complaint that is not part of the due process hearing must be resolved in accordance with the complaints procedure.
- SEAs must resolve complaints alleging an LEA's failure to implement a due process hearing decision. 8 VAC 20-80-76 O.6

<b>Elements of a Complaint</b>
--------------------------------

34 CFR § 300.153 (b)(3) and (4)
---------------------------------

8 VAC 20-80-78 B
------------------

New sub-provisions
--------------------

REVISES the required elements of a complaint to now include:

- the complainant's signature and contact information,
- if alleging violations regarding a specific child:
  - ✓ the name and address of the child's residence,
  - ✓ the name of the school the child is attending,
  - ✓ in the case of a homeless child or youth, available contact information for the child, and the name of the school the child is attending,
  - ✓ a description of the nature of the problem of the child, including the facts relating to the problem, and
  - ✓ a proposed resolution to the problem to the extent known and available to the party at the time the complaint is filed.

These elements are in addition to the current elements of:

- a statement that a LEA has violated a requirement of Part B of the IDEA or of the federal regulations, and
- the facts on which the statement is based.

**In Virginia.** If VDOE determines the complaint to be insufficient, its staff will return the complaint to the complainant with direction for resubmission to VDOE and the LEA.

<b>Submission of Complaint to the LEA</b>
---

34 CFR § 300.153 (d)
----------------------

NEW
-----

ESTABLISHES a provision that the complainant must forward a copy of the complaint to the LEA serving the child at the same time the complainant files the complaint with the SEA.

**In Virginia.** If the complaint does not indicate a simultaneous submission, VDOE staff will return the complaint to the complainant with direction for resubmission to VDOE and the LEA.

<b>Timeline for Filing Complaint</b>
--------------------------------------

34 CFR § 300.153 (c)
----------------------

8 VAC 20-80-78 B.4
--------------------

REVISES the timeline for filing the complaint. A complaint must be filed not more than within one year from the date the alleged violation occurred and the date the complaint is received.

DELETES the current exception clause: “..unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than 3 years prior to the date the complaint is received” by the SEA.

<b>Enforcement of Mediation/Settlement Agreements</b>
---

34 CFR § 300.537
------------------

NEW
-----

ESTABLISHES a provision that allows, but does not require, the State to have a mechanism or procedures to permit parties to mediation or due process resolution agreements to seek enforcement from the State of those agreements, so long as the mechanisms or procedures are not used to deny or delay a parent’s right to seek enforcement through state or federal court.

**In Virginia.** VDOE could assume this responsibility under its Complaint Resolution Procedures, or develop another set of procedures or mechanism to address such a complaint, or VDOE could direct the parties to resolve the issue in court. This matter will be reviewed during the revision of the Virginia Regulations. In the meantime, VDOE will continue to refer the parties to the court for resolution of such matters.

## MEDIATION

The new Federal Regulations mirror the IDEA 2004 statutory changes and do not add any new requirements to the mediation section. However, VDOE clarifies an issue related to § 300.506 (b)(6). The new regulation deleted the provision in § 300.506 (b)(6) that stated that the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the mediation. (see comparable Virginia Regulations at 8 VAC 20-80-74 E.3). VDOE's mediators include this signed pledge at the beginning of the mediation session.

OSEP's rationale in deleting this provision is that § 300.506 (b)(7) already requires that discussions that occur during the mediation process be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Additionally, § 300.506 (b)(6)(i) provides that if mediation resolves the dispute, the parties must execute a legally binding agreement that includes, in part, a statement that all discussions that occur during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

However, OSEP stresses in its *Analysis*, p. 46696, that removal of this provision is not intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that decisions during the mediation process remain confidential, irrespective of whether the mediation results in resolution.

Therefore, VDOE is maintaining the provision in 8 VAC 20-80-74 E.3 and its current practice of ensuring that the parties are allowed to sign a confidentiality pledge at the beginning of the mediation session. Additionally, this means that the confidentiality pledge is not part of the issue(s) being disputed and resolved.

### Additional US DOE Guidance on this topic

The *Analysis*, p. 46695, notes that there is nothing in the IDEA 2004 that would prohibit the parties to agree during mediation to have the mediator facilitate an IEP meeting and to incorporate the terms of the mediation agreement into the child's IEP. Presently, VDOE's mediation system does not include this additional role and responsibility for VDOE's mediators. VDOE will examine this issue during the revision of the Virginia Regulations.

## DUE PROCESS<sup>4</sup>

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Filing Parties</b>	
-----------------------	--

34 CFR 300.507 (a)	8 VAC 20-80-76 B.1
--------------------	--------------------

CLARIFIES that only parents and LEAs can file requests for due process hearings.

<b>Model Due Process Form</b>	
-------------------------------	--

34 CFR 300.509 (b)	8 VAC 20-80-76 C
--------------------	------------------

New sub-provision

CLARIFIES that the SEA and LEA may not require the use of the model due process form for the party filing the request for due process. Parents and other parties may use another form, so long as the form meets the content requirements in § 300.508 (b) for filing a due process hearing request or for filing a complaint with the State’s complaint system under § 300.153 (b).

The new federal regulations now require the same content for the State’s model complaint form to be used by complainants filing under the State’s complaint resolution procedures. Therefore, the federal language extended the requirement to apply also to the State’s complaint model form.

### Resolution Period

34 CFR § 300.510	NEW
------------------	-----

ESTABLISHES:

- This provision requires an LEA to convene a resolution meeting when a parent files a due process hearing request. This provision does not require the LEA to have a resolution meeting when an LEA is the moving party, that is, the party initiating the due process proceedings. See *Analysis*, p. 46700.
- Convening the meeting means the LEA holding the resolution meeting within 15 days of receiving notice of the parent’s request for due process. *Analysis*, pp. 46700-466701.

---

<sup>4</sup> The federal language in the Due Process section uses the term “complaint” when referring to the parent’s request for a due process hearing. Although USDOE distinguishes between this type of “complaint” from that filed under the State’s Complaint Resolution Procedures, the federal language is consistent with the IDEA language. However, for clarity, VDOE is using the word “request” to refer to the parent’s request for a due process hearing. In this way, we hope to properly distinguish between the two systems of complaints resolution procedure and due process procedures.

34 CFR § 300.510 (b)(4)	NEW
-------------------------	-----

ESTABLISHES:

- This provision allows an LEA at the end of the 30 day resolution period to request that the hearing officer dismiss the case, if the LEA is unable to obtain the parent's participation in the resolution meeting after reasonable efforts have been made.
- This provision also requires an LEA to use the same procedures it uses in § 300.322 (d) to document its efforts to obtain the participation of a parent in a resolution meeting. See "Parental Consent – Documenting Parental Consent" of this Guidance Document for those procedures.

34 CFR § 300.510 (b)(5)	NEW
-------------------------	-----

ESTABLISHES a requirement that allows the parent to request the hearing officer to begin the due process hearing proceedings if the LEA fails to hold the resolution meeting within 15 days of receiving notice of a parent's request for a due process hearing or fails to participate in the resolution meeting.

34 CFR § 300.510 (c)	NEW
----------------------	-----

ESTABLISHES adjustments to the 30 day resolution period.

- when both parties agree in writing to waive the resolution meeting.
- after either mediation or resolution meeting starts, but before the end of the 30 day period, both parties agree in writing that no agreement is possible.
- if both parties agree in writing to continue mediation at the end of the 30 day period, but later the parent or LEA withdraws from the mediation process.

<b>Due Process for a Child Ineligible under Part C</b>
34 CFR § 300.518 (c)                      NEW

ESTABLISHES a provision that if a due process hearing involves an application for initial services under Part B for a child who is no longer eligible under Part C, the LEA is not required to continue providing the early intervention services on the child's IFSP. If a child is eligible under Part B and the parent consents, the LEA must provide those special education and related services that are not in dispute between the parent and the LEA.

**Expedited Due Process Hearing**

34 CFR § 300.532 (a) and (c)

8 VAC 20-80-68 C.6

New sub-provisions

§ 300.532 (a) and (c)

ESTABLISHES a provision that the parent and LEA may request a due process hearing regarding disciplinary action by following the requirements of §§ 300.507 and 300.508 (a)( and (b), which are the requirements for a due process hearing request and content of the request.

§ 300.532 (c) (3)

ADDS a new timeline for convening the resolution session within 7 days of receiving notice of the due process request.

Because of the shortened timeline for expedited hearings relative to disciplinary matters, the requirements regarding sufficiency of notice do not apply. See also *Analysis*, p. 46725.

**Enforcing Resolution and Mediation Agreements**

34 CFR § 300.537

NEW

ESTABLISHES a provision that permits the State to establish mechanisms, such as the State's complaint system procedures, to enforce the agreement reached during a resolution session meeting or mediation, provided that the mechanisms are not mandatory and do not deny or delay the right of the parties to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

**In Virginia.** As noted earlier, VDOE will review this option during the revision of the Virginia Regulations.

**Additional US DOE Guidance on this topic**

- There is no requirement that the party who alleges that the notice is insufficient has to state in writing the basis for the belief. The hearing officer decides if the notice is sufficient by meeting the notice requirements of § 300.508 (b). *Analysis*, pp. 46697-46698.
- When a due process notice has been amended, the timeline for the resolution period and the hearing process begin again. *Analysis*, pp. 46698-46699.
- OSEP is considering the issue of non-attorney representation of parties in a due process hearing in light of State rules concerning the unauthorized practice of law. OSEP anticipates publishing a notice of proposed rulemaking in the near future seeking public comment on this issue. *Analysis*, p. 46699.

**In Virginia.** In the meantime, please be advised in Virginia, the Virginia Code, at § 22.1-214 (c), gives lay advocates equal standing to an attorney in due process hearings. This includes the responsibilities attributable to attorneys, including presenting evidence, cross-examining, and compelling the attendance of witnesses.

- Section 300.510 (a)(4) directs the parent and LEA to determine the relevant members of the IEP team to attend the resolution meeting. Remember that § 300.321 (a)(6) provides that the IEP team may include, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child. Therefore, other individuals (except attorneys) could attend a resolution meeting if the LEA or parent determines that such individuals are relevant members of this IEP team. *Analysis*, pp. 46700-46701.

Recall that the school division's attorney is excluded from the resolution meeting, unless the parent brings an attorney. If mediation is used during the 30 day period, instead of the resolution meeting, then the parties may consult VDOE's State Special Education Mediation System's procedures on the role of the attorney.

## **SURROGATES**

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Unaccompanied Homeless Youth</b>	
-------------------------------------	--

34 CFR § 300.519 (f)

8 VAC 20-80-80 B.2

New sub-provision

CLARIFIES that the LEA may appoint a temporary surrogate for a child who is an unaccompanied homeless youth, without regard to the requirements in § 300.519 (d)(2)(i) that a surrogate parent not be an employee of any agency involved in the education or care of the child.

Therefore, a temporary surrogate for an unaccompanied homeless youth may include State, LEA, or agency staff that is involved in the education or care of the child. The person must meet the other requirements of not having a professional or personal interest that conflicts with the child's interest, and must have knowledge and skills that ensure adequate representation of the child. Additionally, it is not necessary to specify a time limit for a temporary surrogate, as the need for this individual will vary dependent on the specific curriculum and unique issues of the unaccompanied homeless youth. *Analysis*, p. 46712.

### Additional US DOE Guidance on this topic

OSEP addresses, once again, what the LEA's responsibility is when there are individuals who are competing as "parent" under the IDEA. *Analysis*, p. 46711.

## TRANSFER OF RIGHTS AT AGE OF MAJORITY

No new provisions

### DISCIPLINE

The Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

<b>Functional Behavioral Assessments &amp; Behavioral Intervention Plans</b>	
34 CFR § 300.530 (b)	8 VAC 20-80-68 C.2.d
34 CFR § 300.530 (f)	

DELETES the current requirement for the development of an FBA and BIP for removals subsequent to the first 10 day removal in a school that is not a long-term removal/change in placement.

The IDEA 1997 and implementing federal regulations in 1999, as well as the Virginia Regulations, required that an FBA be conducted, and BIP be developed as necessary, when the student incurred removals after the first 10 day removal in a school year. The *Analysis*, p. 46721, calls our attention to the fact that Congress specifically removed this provision from the IDEA 2004. This is based on the assumption that IEP teams are mindful of addressing a child's behavioral needs when these behaviors impede the child's learning or that of others. In that case, the IEP team considers "the use of positive behavioral interventions, and other strategies to address the behavior." See IDEA 2004 at § 1414 (d)(3)(B)(i). Therefore, it is assumed that IEP teams will know that when a child incurs short-term removals, after the first 10 day removal in a school year, the team needs to consider doing an FBA and a BIP, or otherwise, develop IEP behavioral interventions and other strategies to address the behavior. USDOE recommend that LEAs still be proactive about completing the FBA-BIP process, if necessary.

CLARIFIES that an FBA and BIP is required, if the child's behavior is a manifestation of the child's disability.

<b>Manifestation Determination Review and IEP Deficiencies</b>	
34 CFR § 300.530 (e)	8 VAC 20-80-68 C.5.e

ADDS a provision that if during the MDR review, the IEP team determines that the child's behavior was a direct result of the LEA's failure to implement the child's IEP, the LEA must remedy these deficiencies immediately.

This provision is currently in the Virginia Regulations, based on the 1999 federal regulations. However, because the IDEA 2004 did not include this provision, the draft of

the federal regulations deleted it. With these final regulations, the provision was reinserted.

### Additional US DOE guidance on this topic

- The regulations support school administrators considering “....any unique circumstances on a case-by-case basis” when reviewing disciplinary action and a child with a disability. While not restricting or limiting what those “unique circumstances” might be, OSEP suggests that those factors might include: a child’s discipline history, ability to understand consequences, and expression of remorse, as well as supports provided to the child prior to the violation. *Analysis*, p. 46714-46715.
- USDOE continues its long standing policy regarding how to process in-school suspension and bus suspension. *Analysis*, p. 46715.

### **In-school suspension**

This means that an in-school suspension would not be considered a part of the 10 days of suspension if the child:

- ✓ is afforded the opportunity to continue to appropriately participate in the general curriculum;
- ✓ continues to receive the services specified on the child’s IEP; and,
- ✓ participates with nondisabled children to the extent they would have in their current placement.

Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals.

### **Bus Suspension**

In Virginia, students with disabilities are entitled to be transported to and from the school/class and home at no cost in order to enable the student to obtain the benefit of educational programs and opportunities. (Code of Virginia, § 22.1-221). If alternative arrangements are not made for the student with a disability who has been suspended from the bus to receive educational services, then that bus suspension would count in the number of removal days. OSEP notes that they continue to emphasize that school divisions should consider whether the behavior on the bus should be addressed in the student’s IEP. *Analysis*, p. 46715.

- Several of the regulatory provisions, most notably § 300.530 (d)(1), provide that a child who receives disciplinary action (except for the first 10 days in a school year) is to continue to receive educational services as to enable the child to continue to participate in the general educational curriculum, although in another setting. OSEP cautions that “participate” does not mean that an LEA has to replicate every aspect of

the services that a child would receive in his/her normal classroom. An example is if the student is taking chemistry, aspects of that class generally include a hands-on component or specialized equipment or facilities, that cannot possibly be duplicated in an alternative setting. This involves modifying the concept of FAPE in circumstances involving removals for disciplinary reasons because the IEP cannot be implemented exactly as written, including related services. What the child does need in order to participate in the general education curriculum and to progress toward meeting the student's IEP goals must be provided to the extent appropriate to the circumstances. *Analysis*, p. 46716.

- OSEP reminds everyone that the requirements for ensuring that all children with disabilities are included in all general State and district wide assessment programs, include children with disabilities who have been placed in an appropriate interim alternative education setting or another setting, or who are suspended. *Analysis*, p. 46718.
- OSEP also reminds us that an LEA is not considered to have a basis of knowledge just because the child is receiving early intervening services. However, if a parent or a teacher of the child receiving early intervening services expresses a concern, in writing to appropriate school division personnel, that the child may need special education and related services, the LEA would be deemed to have knowledge that the child is a child with a disability, triggering the requirements for an expedited evaluation-eligibility determination. *Analysis*, p. 46727.

### STATE ADVISORY PANEL

The new Federal Regulations mirror the IDEA 2004 statutory changes and add or clarify the following requirements.

#### Appointment

34 CFR § 300.167

8 VAC 20-80-30 10.a

DELETES the current provision that if a State has an existing advisory panel that can perform the functions under the advisory panel's functions in the regulations, the State may modify the existing panel so that it fulfills all of the requirements under this section of the federal regulations, instead of establishing a new advisory panel.

#### Membership

34 CFR § 300.168

8 VAC 20-80-30 10.a  
new sub-provision

ADDS a new requirement under membership, that the parents of children with disabilities represent children ages birth through 26. Also adds this requirement under § 300.168 (b) in that the majority of the panel members must be individuals with disabilities or parents of children with disabilities ages birth through 26.

**Duties**

34 CFR § 300.169

8 VAC 20-80-30 10.b

DELETES the provision under the advisory panel's duties to advise on eligible students with disabilities in prison.

The reason given for this deletion is that this provision in the 1999 federal regulations is a nonstatutory mandate. Further, by imposing such a mandate on the advisory panel "... may hinder the panel's ability to effectively provide policy guidance with respect to special education and related services for children with disabilities in the State." *Analysis*, p. 46616.

---

This document is available on the web at: [www.doe.virginia.gov/VDOE/dueproc](http://www.doe.virginia.gov/VDOE/dueproc)

Distribution List:

VDOE Staff  
 VDOE Hearing Officers  
 VDOE Mediators  
 Local Special Education Administrators  
 SSEAC  
 Virginia Board for People with Disabilities, Early Intervention/Education Committee  
 State Operated Programs – Education Directors  
 T/TAC Directors  
 Parent Resource Centers  
 PEATC  
 Local Advisory Chairs  
 Office of the Attorney General – Education Division  
 Art Cernosia, Esq., consultant to VDOE's Due Process Hearing System

ATTACHMENT:

"Highly Qualified Teachers", USDOE OSEP's publication, August 2006.